(15)

No. 95-266

Supreme Court, U.S.
FILED
JAN 2 1996
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

CARRIE JAFFEE, AS SPECIAL ADMINISTRATOR FOR RICKY ALLEN, SR., DECEASED,

Petitioner,

v.

MARY LU REDMOND AND THE VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE EMPLOYEE ASSISTANCE PROFESSIONALS ASSOCIATION, INC., IN SUPPORT OF RESPONDENTS

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January 2, 1996

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STATEMENT OF INTEREST

With the consent of the parties, the Employee Assistance Professionals Association, Inc., (EAPA) respectfully submits this brief *amicus curiae* in support of Respondents.[1] EAPA, founded in 1971, is the largest and oldest professional organization for employee assistance (EA) professionals in the United States. EA professionals are hired by employers to aid in the prevention and resolution of problems affecting employee productivity and well-being. These problems may arise from a number of sources, among them mental or emotional conditions, including substance abuse, that may require psychotherapeutic treatment. Employee assistance programs (EAPs) are widely established, and are used by over 17,000 employers nationwide. EAPs are in place in workplaces that employ 45% of American workers. The profession is gaining legal recognition as well, under both federal and state law.[2]

EA professionals working in EAPs do not in their capacity as EA professionals diagnose or treat mental illness, although many of them are also licensed psychotherapists who may in that capacity provide diagnostic and therapeutic services. Because EA professionals acting in that capacity do not diagnose or treat mental illness, they will not be directly affected by the outcome of the instant case, and EAPA makes no argument that EA professionals acting in that capacity are independently entitled to the psychotherapist-patient privilege at issue here. Nonetheless, EAPA has at least two distinct interests in this litigation.

First, those members of EAPA who are also psychiatrists, psychologists and licensed clinical social workers may in those capacities be affected by the outcome of this case.

Second, EA professionals play an essential role in the workplace in identifying problems that may interfere with job performance and well-being, in encouraging troubled employees to seek appropriate psychotherapeutic treatment, and in referring them

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[1] Letters reflecting written consent of the parties to the submission of this brief have been filed with the Clerk of the Court.

[2] See, *e.g.*, 49 C.F.R. § 219.5 (federal Department of Transportation safety regulations); 48 C.F.R. § 23.504 (federal Drug-Free Workplace regulations); Tenn. Code Ann. § 62-42-101, *et seq.* (Supp. 1995) (state licensure).

for such treatment. Indeed, in some workplaces employees are required by their health insurers to see an EA professional for assessment and referral before they may seek treatment by a licensed psychotherapist. The psychotherapist-patient privilege therefore may in some circumstances be relevant to EA professionals in their problem identification and referral capacity. Cf., *e.g.*, 25 C. Wright & K. Graham, *Federal Practice and Procedure* § 5531, p. 237 (1989) (Wright & Graham) (discussing application of physician-patient privilege to communications with non-physician members of the health care delivery team that are functionally related to diagnosis and treatment).

SUMMARY OF ARGUMENT

I. This case requires this Court to decide whether to recognize a privilege under Federal Rule of Evidence 501 for confidential communications between a patient and her psychotherapist. The case for recognizing the privilege is compelling.

Congress has given this Court the responsibility to develop an evolving federal law of privilege "governed by the principles of the common law as they may be interpreted . . . in the light of reason and experience." Fed. Rule of Evid. 501. In determining whether to recognize a psychotherapist-patient privilege, this Court must interpret in light of reason and experience the common-law principle that a privilege for confidential communications should be recognized if it promotes a public good more important than the need for the evidence it will exclude. See, *e.g.*,*Trammel* v. *United States*, 445 U.S. 40, 50-51 (1980). In assessing a claim of privilege under Rule 501, this Court should look first to the interests that may justify the claimed privilege, and then to the current state of the law and of legal thought concerning it.

This Court has described two interests that may justify a privilege for confidential communications, and each is independently sufficient to support recognition of the psychotherapist-patient privilege. First is the utilitarian interest in encouraging individuals to make disclosures in certain settings because those disclosures are necessary to the proper performance of a function that society values. There could hardly be a more

valuable function than the diagnosis and treatment of mental and emotional disorders. In this case, confidentiality is necessary both to ensure that such diagnosis and treatment is sought by those who need it, and to ensure that that treatment may be effective.

Second is the inherent moral and ethical interest in preserving confidentiality in certain settings. In this case, protection of the privacy of communications between patient and psychotherapist in the course of diagnosis and treatment is required as a matter of intrinsic decency. Indeed, the precepts of civilized society require recognition of the sanctity of the highly personal communications made in confidence between a patient and his or her psychotherapist.

The inquiry into the state of the law, too, strongly supports recognition of the psychotherapist-patient privilege. Not only have expert bodies and legal scholars overwhelmingly concluded that recognition of the privilege is appropriate, but the privilege has been recognized by all fifty States.

II. The psychotherapist-patient privilege should also be recognized because failure to recognize it would unnecessarily render the privilege for communications between an individual and his or her clergyperson susceptible to Establishment Clause challenge. Although the instant case does not present the question whether or to what extent the psychotherapist-patient privilege is itself constitutionally required, the Court can and should consider the impact its decision will have beyond the context of this case in light of the constitutional command of neutrality toward religion.

III. This Court need not define the precise contours of the privilege in this case. Indeed, to act in such a legislative fashion would be inappropriate under the method mandated by Rule 501. However in addressing Petitioner's suggestion that the psychotherapist-patient privilege should not be applied on the particular facts of this case, this Court should make clear that any countervailing concerns about particular applications of the privilege should be addressed through categorical exceptions rather than through application of an *ad hoc* balancing test in each case in which the privilege is invoked. The Court has recognized that this

is the appropriate approach in previous cases applying the law of privilege under Rule 501, and only such a categorical approach will provide patients *ex ante* with the certainty necessary for the privilege to serve its utilitarian function.

IV. Finally, because the propriety of the privilege turns on the function of diagnosing and treating mental or emotional conditions, it logically should apply to all who are licensed or certified by law to perform that function, including licensed clinical social workers. In addition, an arbitrary limitation of the privilege to a fixed subcategory of licensed psychotherapists that includes only psychiatrists and psychologists could dramatically reduce the availability of psychotherapeutic services, and could lead to a substantial increase nationally in the cost of mental health care services. Particularly at a time of enormous pressure to reduce the costs of quality health care, this Court should take care not to disrupt the market for health care services, an area of traditional state regulation, in the absence of a clear legal imperative.

ARGUMENT

I. THIS COURT SHOULD RECOGNIZE A PSYCHOTHERAPIST-PATIENT PRIVILEGE FOR COMMUNICATIONS BETWEEN A PATIENT AND A LICENSED OR CERTIFIED PSYCHOTHERAPIST ENGAGED IN THE DIAGNOSIS OR TREATMENT OF A MENTAL OR EMOTIONAL CONDITION

This Court should recognize a psychotherapist-patient privilege for communications made by a patient in confidence to a psychotherapist who is licensed or certified by law to engage in the diagnosis or treatment of mental or emotional conditions, including substance abuse. This privilege should apply only to communications made for purposes of diagnosis or treatment and "should cover [information communicated by] non-verbal acts of the patient as well as more traditional modes of communication." 25 Wright & Graham § 5530, p. 210. Such a privilege has perhaps the strongest claim to recognition of any evidentiary privilege unknown at common law.

A. Congress Has Delegated to the Courts the Responsibility to Develop the Law of Privilege Under the Method of the Common Law

Congress has delegated to the federal courts, and thus, ultimately, to this Court, the responsibility to "develo[p a] federal common law of evidentiary privileges." *United States* v. *Zolin*, 491 U. S. 554, 574 (1989). Federal Rule of Evidence 501 provides that in cases like the instant one in which the rule of decision as to all claims and defenses is provided by federal law:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Fed. Rule Evid. 501.[3]

It was Congress's intent in adopting Rule 501 that the law of privilege not be frozen in time. *Trammel* v. *United States*, 445 U. S. 40, 47 (1980). Rule 501 provides this Court with a mandate "to continue the evolutionary development of testimonial privileges." *Id.* The Rule was adopted in 1975 after Congress rejected the Proposed Federal Rules of Evidence (Proposed Rules) pertaining to privilege drafted by the Judicial Conference Advisory Committee on Rules of Evidence (Advisory Committee), and approved by the Judicial Conference of the United States and by this Court. See *id.* The Proposed Rules would have wiped out the pre-existing law of privilege and would have granted recognition only to nine distinct categories of privileged information. See 56

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[3] The Rule goes on to provide, in language not applicable here, that "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law."

F.R.D. 183, 234-258 (1973) (Proposed Rules 502-510). Congress rejected the static approach taken by the Proposed Rules, and instead adopted Rule 501, which was intended to "leav[e] the law in its current condition to be developed by the courts of the United States utilizing the principles of the common law," S. Rep. No. 93-1277, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 7051, 7053. See *Trammel*, 445 U. S. at 47.[4]

By adopting Rule 501, Congress has thus delegated to the federal courts the responsibility to develop the federal law of privilege in light of new and changing circumstances. In applying the Rule, this Court has in appropriate circumstances both expanded and contracted the scope of previously-recognized evidentiary privileges. In *Upjohn Co.* v. *United States*, 449 U. S. 383 (1981), for example, the Court expanded the attorney-client privilege beyond what was covered at common law to apply to communications by employees of a corporation with that corporation's counsel. *Id.* at 389-397. In *Trammel* v. *United States*, by contrast, the Court narrowed the privilege recognized at common law against adverse spousal testimony, so that it could be invoked only by the "witness-spouse." 445 U. S. at 53.

In a changing world, this Court's power is not limited to applying only those privileges recognized at common-law. Indeed, in applying the language codified in Rule 501 this Court has also, contrary to Petitioner's assertion, Petitioner's Brief (Pet. Br.) 14, recognized at least one category of privilege that, like the psychotherapist-patient privilege, was not known at common law. In *Wolfle* v. *United States*, 291 U. S. 7 (1934) — the very case in which the language now codified in Rule 501 originated, *id.* at 12 — the Court recognized a privilege for confidential communications between husband and wife that was not recognized at common law. *Id.* at 14; accord *Trammel*, 445 U. S. at 51 and n.5 (leaving undisturbed *Wolfle*'s "independent rule protecting

[4] It is also clear that Congress rejected the Proposed Rules in large part because they made no provision for the application of the state law of privilege in diversity cases. See, *e.g.*, 23 Wright & Graham § 5421, pp. 648-666 (1980) (describing the controversy over the Proposed Rules).

confidential marital communications").[5] Similarly, those federal Courts of Appeals that have addressed the issue have recognized a federal privilege for confidential communications to members of the clergy,[6] despite the fact that no such privilege was recognized at common law.[7] This Court, too, has described that privilege with approval. See *Trammel*, 445 U. S. at 51 (dictum).

Under Rule 501, then, "[t]he courts must continue to develop recognized privileges, as well as to formulate new privileges, on a case-by-case basis." 2 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶501[03], p. 501-37 to 501-39 (1989) (Weinstein & Berger) (footnotes omitted). This is not to say that the Court should act without careful consideration. Since every privilege conflicts with "the fundamental principle that the public . . . has a right to every man's evidence," privilege should not cavalierly be recognized. *Trammel*, 445 U. S. at 50 (citation and internal quotation marks omitted). But where "reason and experience" indicate that an evidentiary privilege is warranted, Rule 501 requires this Court to recognize it.

[5] Although some courts have acted on the belief that marital communication was privileged at common law, see J. Strong, *McCormick on Evidence* § 79, p.113 (4th ed. 1992), the historical evidence does not support this conclusion. See *Shenton* v. *Tyler*, [1939] Ch. 620, 635 (concluding after exhaustive inquiry that "the alleged common law rule of privilege protecting marital communications as such never existed"); 8 J. Wigmore, *Evidence* § 2333, pp. 644-645 (McNaughton rev. 1961) (Wigmore) (privilege recognized in England only in the 1850s; in the United States, privilege adopted in most States by legislation). *Trammel* addressed the distinct common-law rule that disqualified one from testifying either for or against one's spouse in any case in which he or she was a party. This rule applied whether or not the testimony concerned confidential communication. See, *e.g.*, *Trammel*, 445 U. S. at 43-44.

[6] See *In Re Grand Jury Investigation*, 918 F. 2d 374, 378-385 (CA3 1990); *United States* v. *Dubé*, 820 F. 2d 886, 889-890 (CA7 1987) (dictum); *United States* v. *Luther*, 481 F. 2d 429, 433 (CA9 1973) (dictum); *United States* v. *Wells*, 446 F. 2d 2, 4 (CA2 1971) (dictum); *Mullen* v. *United States*, 263 F. 2d 275, 277-280 (CADC 1959) (Fahy, J., joined by Edgerton, J.).

[7] See 8 Wigmore § 2394, p. 869.

B. Every Factor Appropriately Considered by This Court Counsels in Favor of Recognizing the Privilege

The Court's role in this case is to interpret in light of reason and experience the common-law principle that a privilege for confidential communications should be recognized when its benefit in terms of the promotion of important interests is judged to outweigh its cost in terms of the loss of probative evidence. See *University of Pennsylvania* v. *E.E.O.C.*, 493 U. S. 182, 189 (1990); *Trammel*, 445 U. S. at 50-51. Assessment of the interests that would be served by the asserted privilege should be the first avenue of the Court's inquiry. Cf., *e.g.*, *Zolin*, 491 U. S. at 569; *Trammel*, 445 U. S. at 50-53. The second should be the state of the law and of legal thought concerning the asserted privilege. Cf., *e.g.*, *Zolin*, 491 U. S. at 570; *Trammel*, 445 U. S. at 48-50.

In describing the law of privilege, this Court has recognized two distinct interests that may justify an evidentiary privilege for confidential communications. See *Trammel*, 445 U. S. at 51. These two interests are also widely described in the literature. See, *e.g.*, J. Strong, *McCormick on Evidence* § 86, pp. 118-119 (4th ed. 1992) (McCormick); 23 Wright & Graham § 5422, pp. 670-671 (1980); *Developments in the Law — Privileged Communications*, 98 Harv. L. Rev. 1450, 1471-1486 (1985). The first is the utilitarian interest in encouraging the individual to speak candidly in a particular confidential setting. The second is the inherent ethical and moral interest in preventing inquiry into the contents of confidential communications made within a particular relationship.

The Court's opinion in *Trammel*, its first to construe Rule 501 after its enactment, illustrates these two interests. The Court described the attorney-client privilege in terms of the first justification: The "lawyer client-privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." 445 U. S. at 51. The Court articulated the same type of justification for the physician-patient privilege. *Id.*[8] By

[8] The physician-patient privilege was not recognized at common law. Since its first legislative recognition by New York in 1828 it has been adopted in some form in about three-fourths of the States. See 2 Weinstein & Berger ¶ 504[01], p. 504-9.

contrast, in describing the justification for the privilege for confidential communications with a member of the clergy, the Court did not focus on the necessity of confidentiality for the achievement of some valuable clerical purpose, but on the human need of the individual communicant for confidence in that setting: "The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return." *Id.*

With respect to many widely-recognized privileges for confidential communication these justifications are two sides of a coin. Society has an instrumental interest *ex ante* in encouraging the communications at issue. It also has a moral and ethical interest *ex post* in ensuring both that the contents of those communications remain private and that those who receive such confidential communications not be forced to breach the trust placed in them.

In addition to examining the interests served by the asserted privilege, this Court has been particularly sensitive to the state of the law when articulating the law of privilege. See, *e.g. Zolin*, 491 U. S. at 570; *Trammel*, 445 U. S. at 48-50. This Court has followed "the characteristic principle of the common law to draw its inspiration from every fountain of justice," *Hurtado* v. *California*, 110 U. S. 516, 531 (1884). Thus, in exercising its responsibility to explicate "the developing federal common law of evidentiary privileges," *Zolin*, 491 U. S. at 574, the Court has not only reasoned by analogy to existing law, see, *e.g.*, *Upjohn*, 449 U. S. at 389-396, but has also looked for guidance to a variety of outside sources, including developments in state legislation, see, *e.g.*, *Trammel*, 445 U. S. at 48; *Funk* v. *United States*, 290 U. S. 371, 380 (1933), the recommendations of expert bodies, *Zolin*, 491 U. S. at 570; *Trammel*, 445 U. S. at 48-49, and scholarly opinion, *Zolin*, 491 U. S. at 569-570; *Trammel*, 445 U. S. at 50.

1. A Privilege for Communications Between a Patient and His or Her Psychotherapist is Justified on Utilitarian Grounds

Again, the first rationale for recognition of privilege is the utilitarian one, aimed at encouraging the disclosures that would be protected by the privilege. According to Wigmore this is the primary rationale for recognition of a privilege for confidential communication that can be deduced from the cases decided at common law. In Wigmore's classic articulation of this utilitarian rationale he said:

> Looking back upon the principle of privilege, as an exception to the general liability of every person to give testimony upon all facts inquired of in a court of justice, and keeping in view that preponderance of extrinsic policy which alone can justify the recognition of any such exception, four fundamental conditions are recognized as necessary to the establishment of a privilege against the disclosure of communications:
>
> (1) The communications must originate in a *confidence* that they will not be disclosed.
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*
>
> (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

8 J. Wigmore, *Evidence* § 2285, p. 527 (McNaughton rev. 1961) (Wigmore) (emphasis in original, citations and footnote omitted).

Although satisfaction of Wigmore's four conditions is not necessary to recognition of a privilege for confidential communication, see *infra* at 16-19, commentators are in wide agreement that it is sufficient to require it. See, *e.g.*, 2 D. Louisell & C. Mueller, *Federal Evidence* § 201, p.655 (revised ed. 1985) (Louisell & Mueller); 8 Wigmore § 2396, p. 878 (priest-penitent

privilege, not known to the common law, should be recognized because it meets each of the four criteria described above). Recognition of the psychotherapist-patient privilege would be appropriate upon consideration of utilitarian grounds alone, because the privilege meets these four conditions. See, *e.g.*, Louisell, *The Psychologist in Today's Legal World: Part II*, 41 Minn. L. Rev. 731, 746 (1957) (Louisell). [9]

First, communication with a psychotherapist does originate in confidence. The professional organizations from whom psychotherapists are drawn all impose ethical obligations of confidentiality upon their members. See, *e.g.*, American Psychiatric Association, *Principles of Medical Ethics, With Annotations Especially Applicable to Psychiatry*, § 4 (1984); American Psychological Association, *Ethical Principles of Psychologists and Code of Conduct*, Ethical Standard 5 (1992); National Association of Social Workers, *Code of Ethics of the National Association of Social Workers*, Principle II.H (rev. 1993) (*NASW Code*). In practice, psychotherapists do keep patient communications confidential, and those who see psychotherapists expect their communications with them to be kept confidential. See, *e.g.*, McGuire, Toal and Blau, *The Adult Client's Conception of Confidentiality in the Therapeutic Relationship*, 16 Prof. Psychol.: Research & Practice 375, 380 (1985).

Second, without confidentiality effective psychotherapy would not be possible. To begin with, confidentiality is necessary to get many of those who need treatment even to seek it. Although a privilege for the identity of a patient is not at issue in this case, in light of the stigma and embarrassment that still attend mental illness and psychotherapeutic treatment, confidentiality — even of the patient's identity and of the very fact of treatment — is necessary if those who need treatment are not to be deterred from obtaining it. See, *e.g.*, 2 Louisell & Mueller § 216, p. 857

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[9] And, indeed, before the courts were overtaken by legislative action, the common law "had indicated a disposition to recognize a psychotherapist-patient privilege." See Advisory Committee Note to Proposed Rule 504, 56 F.R.D. at 242 (citing Note, *Confidential Communications to a Psychotherapist: A New Testimonial Privilege*, 47 Nw. U. L. Rev. 384 (1952)).

("Clearly, the idea of confidential communication must encompass the identity of the patient as well."). Consequently Illinois, to give just the example of the State in which this case arises, expressly includes the fact of psychotherapeutic treatment within the privilege. See 740 Ill. Comp. Stat. Ann. 110/2 (Supp. 1995); see also 42 C.F.R. § § 2.11, 2.12 (prohibition on use or disclosure of "patient identifying information" concerning anyone diagnosed or treated for substance abuse at facilities receiving federal funds). Unfortunately, the words of Professor Slovenko 35 years ago retain vitality in many communities in the United States today:

> It is vital to maintain confidentiality as to the fact of treatment as well as to communications made in treatment. By and large, people in the community, even those who are well-informed on other matters, consider a person's treatment by a psychiatrist as evidence of his "queerness" or even insanity. A person may hesitate to visit a psychiatrist out of fear that he will be set apart from his fellow men.

Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 Wayne L. Rev. 175, 188 (1960) (Slovenko) (footnote omitted). Cf. Bundy and Elhauge, *Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and its Regulation*, 79 Calif. L. Rev. 315, 409 (1991) (arguing that attorney-client privilege does not protect client identity because "clients would communicate their identity to the lawyer with or without a guarantee of confidentiality in order to secure representation").

Even more fundamentally, without an assurance of confidentiality those who are patients may be deterred from the disclosures that are required for successful treatment. As the Group for the Advancement of Psychiatry put it:

> Among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this rule . . ., there is wide

> agreement that confidentiality is a *sine qua non* for successful psychiatric treatment. The relationship may well be likened to that of the priest-penitent or the lawyer-client. Psychiatrists not only explore the very depths of their patients' conscious, but their unconscious feelings and attitudes as well. Therapeutic effectiveness necessitates going beyond a patient's awareness and, in order to do this, it must be possible to communicate freely. A threat to secrecy blocks successful treatment

Group for the Advancement of Psychiatry, Report No. 45, p. 92 (1960), *quoted in* Advisory Committee Note to Proposed Rule 504, 56 F.R.D. at 242.

A "privilege for those receiving psychotherapy is necessary if the psychiatric profession is to fulfill its medical responsibility to its patients." Slovenko, 6 Wayne L. Rev. at 199. This is because, in the words of the D.C. Circuit:

> Many physical ailments might be treated with some degree of effectiveness by a doctor whom the patient did not trust, but a psychiatrist must have his patient's confidence or he cannot help him. "The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition. * * * It would be too much to expect them to do so if they knew that all they say — and all that the psychiatrist learns from what they say — may be revealed to the whole world from a witness stand."

Taylor v. *United States*, 222 F. 2d 398, 401 (CADC 1955) (quoting M. Guttmacher and H. Weihofen, *Psychiatry and the Law* 272 (1952)).

Most empirical studies, too, indicate that the possibility of non-consensual disclosure of patient confidences would have a serious damaging effect on the psychotherapeutic relationship. See

generally Applebaum, Kapen, Walters, Lidz and Roth, *Confidentiality: An Empirical Test of the Utilitarian Perspective*, 12 Bull. Am. Acad. Psychiatry & L. 109 (1984). In the absence of stronger empirical evidence to the contrary than that presented by Petitioner, the Court is entitled to conclude consistent with common sense, as it has in the attorney-client context, that denial of a privilege concerning information that an individual would not want made public will "discourag[e] the communication" of that information. See *Upjohn*, 449 U. S. at 392.[10]

Third, the relation between psychotherapist and patient is one which deserves recognition and countenance. The value to society of psychotherapy is great. Psychotherapeutic treatment has provided millions of Americans relief from the deep, and often debilitating distress of mental and emotional illness. It provides tools to allow an end to patterns of destructive behavior. It permits some who otherwise could not to play a productive role in society.

[10] The studies Petitioner cites, Pet. Br. 26-28, do not support her argument. Most fundamentally, the article on which Petitioner primarily relies, Shuman, Weiner and Pinard, *The Privilege Study (Part III): Psychotherapist-Patient Communications in Canada*, 9 Int'l. Journal of L. and Psych. 393 (1986), concludes on the basis of the three studies undertaken by its co-authors and cited by Petitioner, see Pet. Br. 28, that "[s]uggesting a condition of no privilege produced a statistically significant reduction in lay persons indicating a willingness to discuss a variety of issues with therapists." 9 Int'l. Journal of L. and Psych. at 415-416.

The authors do also purport to show that the absence of the privilege had no effect on the degree to which psychotherapy patients reported withholding information from their therapists, but this conclusion is fatally flawed. The authors' study compared patients of psychiatrists in common-law Ontario with those in civil-law Quebec, which traditionally had a physician-patient privilege applicable to psychiatrists. As the study itself describes, however, although there was no such privilege at common law, the courts of Ontario have in practice refused to require testimony of psychiatrists and marital counselors, see *id.* at 396-401, 409, and the rates at which psychotherapists are required to disclose confidential communications in court is not significantly different under the two legal systems, *id.* at 411. Further, the study reveals that 81% of the patients surveyed in Ontario were under the impression that their communications were in fact protected by a psychotherapist-patient privilege. *Id.* at 407. Consequently, it would be both unremarkable and unrevealing if there were no difference in the disclosures made under these two legal systems.

It gives individuals a chance to lead more rewarding lives.

Finally, the benefit wrought by the privilege will outweigh the harm caused by it. The costs in terms of loss of evidence, although undoubtedly real, are not so substantial as to require rejection of the privilege. Most significantly, a psychotherapist-patient privilege would not provide a shroud of secrecy for the underlying facts relevant to the elements or defenses in any legal proceeding, but would protect only certain second-hand communications describing those facts.

As this Court has said, "[a] fact is one thing and a communication concerning that fact is an entirely different thing." *Upjohn*, 449 U. S. at 395-396 (internal quotation marks and citation omitted). If the privilege is recognized, the patient "may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his [privileged] communication." *Id* at 396. Consequently, what this Court said of the attorney-client privilege in *Upjohn* would be equally true of the psychotherapist-patient privilege: The privilege would "pu[t] the adversary in no worse position than if the communications had never taken place. The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated" with the psychotherapist. See *id.* at 395.[11]

The same could not have been said of those privileges that have been rejected by this Court Under Rule 501. In *University of Pennsylvania* v. *E.E.O.C.*, 493 U. S. at 182, this Court rejected a privilege for the peer review information that was relied upon in the very tenure decision at issue in that case. See *id.* at 185-187. Similarly, in *United States* v. *Gillock*, 445 U. S. 360, 366 (1980), this Court declined in a public corruption case to create a privilege barring the "introduction of evidence of legislative acts in federal criminal prosecutions against state legislators." That privilege could, in effect, have immunized Respondent's criminal conduct by

[11] Courts would likely be required to create an exception to the privilege for cases in which the contents of the assertedly privileged communications are themselves at issue. No such circumstances, however, are presented in this case.

preventing the introduction of "proof of the relevant facts." *Id.* at 374.

In this case, the scope of evidence that may be excluded by the privilege is dramatically narrower. "[T]he social value which effective psychiatric treatment has for the community far outweighs the potential loss of evidence." 2 Weinstein & Berger, ¶ 504[03], p. 504-18 (citation and internal quotation marks omitted).

2. A Civilized Society Must Respect the Privacy of Thoughts and Emotions Revealed to One's Psychotherapist

a. Perhaps even more important than the utilitarian justification is the second rationale for the recognition of a privilege for confidential communications: that it is required as a matter of "intrinsic decency." Letter of Professor Charles L. Black, Jr., to the Honorable William L. Hungate (February 5, 1973) (Black Letter) *reprinted in Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess., ser. 2 at 240, 242 (1973) (*House Hearings*).

This rationale says that a privilege may be justified, not only by its instrumental significance in assuring a candid communication that society seeks to encourage, but also by the fact that society should, as a moral and ethical matter, recognize the essential privacy of communications made within certain significant relationships. See, *e.g.*, *Trammel* v. *United States*, 445 U. S. at 51 (privilege for communications between an individual and his or her clergyperson is provided in recognition of the "human need" for "total and absolute confiden[tiality]" in disclosures of "what are believed to be flawed acts or thoughts," made "to a spiritual counselor" by one seeking "priestly consolation and guidance"). Privileges for confidential communications made within certain relationships thus may be justified by "our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life," *Withrow* v. *Williams*, 113 S. Ct. 1745, 1753 (1993) (citations and internal quotation marks omitted), regardless of whether the

communications at issue would nonetheless be made in the absence of a privilege. The importance of this principle can hardly be overstated. Its vitality is necessary for the operation of a civilized society.[12]

Under this rationale, a privilege for communications between a patient and his or her psychotherapist is amply justified. Communications with one's psychotherapist "often concern the most intimate and embarrassing details of a patient's life, and their public exposure may well strip him of much of his own sense of human dignity." *Lora* v. *Board of Ed. of New York*, 74 F.R.D. 565, 571 (E.D.N.Y. 1977) (Weinstein, J.); see *In Re Doe*, 964 F. 2d 1325, 1328 (CA2 1992) ("[d]isclosure . . . would frequently be embarrassing to the point of mortification for the patient"). It would be indecent were a patient's most intimate thoughts and feelings rendered subject to courtroom display — whenever they might be even remotely relevant to any lawsuit that can survive a motion to dismiss — solely because they were communicated to a psychotherapist for purposes of diagnosis and treatment. Cf, *e.g.*, *Rochin* v. *California*, 342 U. S. 165, 173 (1952) (government must "respect certain decencies of civilized conduct" and may not require a doctor to pump the stomach even of a criminal suspect in order to obtain evidence of crime); see also *Skinner* v. *Railway Labor Executives Association*, 489 U. S. 602, 617 (1989) (disclosure of the results of the "chemical analysis of urine" "intrudes upon expectations of privacy that society has long recognized as reasonable" because it "can reveal a host of private medical facts" about an individual).

b. Viewed from the other side of the confidential commu-

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[12] The significance of the continued vitality of this second type of justification is perhaps best illustrated by the privilege for confidential communication between husband and wife. It is unlikely that a case can be made that intimate communications between husband and wife are actually encouraged by the existence of a privilege covering those communications. McCormick § 86, p. 118. The candor within marriage is typically rooted in something far deeper than a concern about the remote possibility of civil or criminal litigation. Nonetheless, the privilege endures because it "serve[s] to protect the essential privacy of [this] significant human relationshi[p]." *Id.* § 72, p. 101.

nication, it would also be indecent to require the psychotherapist to reveal information that he or she has obtained in confidence during the course of diagnosis or treatment. Ethics and the preservation of trust require that confidential information obtained in the course of certain relationships not be divulged. See, *e.g.*, *Wolfle* v. *United States*, 291 U. S. at 14 (holding the privilege for confidential spousal communications justified because those communications are "so essential to the preservation of the marriage relationship").[13] This judgment is reflected in the ethical rules imposed upon all members of those professions that diagnose and treat mental illness, and in the laws of all fifty States, see *infra* at 19-20. It should likewise be reflected in the federal common law of privilege.

The concern about the position in which a failure to recognize a privilege will put those who receive information that they are ethically or morally bound to keep in confidence was put most eloquently by Professor Black in a letter criticizing the Advisory Committee for its rejection in the Proposed Rules of the privileges for confidential communications between husband and wife and between doctor and patient:

> [T]he meaning of [Proposed Rule 505, which would have rejected a privilege for communications between husband and wife] . . . is that, however intimate, however private, however embarrassing may be a disclosure by one spouse to another, or some fact discovered, within the privacies of marriage, by one spouse about another, that disclosure or fact can be wrung from the spouse under penalty of being held in contempt of court, if it is thought barely relevant to the issues in anybody's lawsuit for breach of a contract to sell a carload of apples. It ought to be enough to say of such

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[13] This requirement was recognized as long ago as Hippocrates:

> Whatsoever things I see or hear . . . in my attendance on the sick . . ., which ought not to be noised abroad, I will keep silence thereon, counting such things to be as sacred secrets.

Hippocratic Oath *reprinted in* 23 *The New Encyclopædia Britannica* 889 (15th ed. 1987).

> a rule that it could easily — even often — force any decent person — anybody any of us would want to associate with — either to lie or to go to jail. No rule can be good that has that consequence — that compels the decent and honorable to evade or to disobey it.
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> . . . .
>
> [As to] the abolition of the physician-patient privilege. . . . [a]ll of us would consider it indecent for a doctor, in the course, say, of a television interview, or even in a textbook, to tell all he knows, naming names, about patients who have been treated by him. Why does this judgment of decency vanish from sight, sink to absolute zero, as soon as somebody files any kind of non-demurrable complaint in a federal court? Here again, can a rule be a good one when the ethical doctor *must* violate it, or hedge, or evade?

Black Letter, *reprinted in House Hearings* at 241-242.

These words certainly apply to the relationship between psychotherapist and patient. Failure to recognize the psychotherapist-patient privilege would come at an unacceptable cost to the integrity of both parties to that sacrosanct relationship. In a civilized society, the privacy of confidential communications between patient and psychotherapist requires legal recognition.

3. Failure to Recognize the Privilege Would Leave the Federal Courts Alone Among American Courts

If "[r]eason thus supports recognition" of the privilege, see *In Re Doe*, 964 F. 2d at 1328, so, too, does experience. In light of the foregoing discussion, it should be unsurprising that the psychotherapist-patient privilege has gained virtually universal recognition in the United States.

a. First, as Petitioner concedes, Pet. Br. 31, every State has recognized the sanctity of the psychotherapist-patient relationship, and has adopted some form of psychotherapist-patient privilege. See Petition for Certiorari Appendix (Pet. App.) 20 and n. 17. This amounts to more than the mere "trend" in the law relied upon by

the Court in prior Rule 501 cases. See, *e.g.*, *United States* v. *Zolin*, 491 U. S. at 570; *Trammel*, 445 U. S. at 48-50. If this Court rejects the privilege, the federal courts will stand alone among American courts. Of course, the federal courts are not *bound* in cases like this by state laws of privilege, but the considered judgment of all fifty States should carry enormous, perhaps dispositive weight with this Court as it seeks the light of "reason and experience."

Indeed, in light of the uniform recognition of some form of psychotherapist-patient privilege under each State's law, failure to recognize a federal psychotherapist-patient privilege would raise a substantial federalism concern. The protection of the health of its citizens is of course one of a State's traditional police powers. See, *e.g.*, *Jacobson* v. *Massachusetts*, 197 U. S. 11, 30-31 (1905). Each State's judgment to provide a privilege for communications between patient and psychotherapist reflects at least in part a desire to encourage the effective treatment of mental and emotional illness. A decision by this Court to deny the privilege under Rule 501 would destroy the confidence of patients in each State that their communications with their psychotherapists will be kept confidential. This would undercut at least to some extent every State's attempt to regulate, in part through its law of privilege, the delivery of mental health services within its borders.

b. Second, those *federal* Courts of Appeals that have taken the approach to privilege required by Rule 501 and the decisions of this Court have all recognized the psychotherapist-patient privilege. See *Jaffee* v. *Redmond*, Pet App. 1 (CA7 1995) (opinion below); *In Re Doe*, 964 F. 2d at 1325 (CA2 1992); *In re Zuniga*, 714 F. 2d 632 (CA6), cert. denied, 464 U. S. 983 (1983). As Judge Winter concluded in *In re Doe*, "[t]he cases rejecting the privilege are not helpful . . . because they are founded on the view that Rule 501 limits the development of privileges to those recognized by the common law, a position that we regard as contrary to the teaching of *Trammel* 'not to freeze the law of privilege.' 445 U. S. at 47." 964 F. 2d at 1328.[14]

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[14] The Fourth, Fifth and Eleventh Circuits have rejected the psychotherapist-patient privilege in summary fashion by flatly stating that no physician-patient privilege of any kind existed at common law. See, *e.g.*, *United States* v. *Meagher*, 531 F. 2d 752, 753 (CA5) (in a case involving a psychiatrist, court refused only "to recognize a physician-patient privilege"), cert. denied, 429 U. S. 853 (1976); *Hancock* v. *Hobbs*, 967 F. 2d 462, 466 (CA11 1992) (concluding that "[f]ederal common law does not recognize a psychiatrist-patient privilege," in reliance only on the statement that "The physician-patient evidentiary privilege is unknown to the common law."); *United States* v. *Corona*, 849 F. 2d 562, 567 (CA11 1988) (common law does not "provid[e] for any type of physician-patient privilege"), cert. denied, 489 U. S. 1084 (1989); *Slakan* v. *Porter*, 737 F. 2d 368, 377 (CA4 1984) (relying only on the Fifth Circuit's decision in *Meagher*, *supra*, for the "well-settled federal rule that such communications are not privileged"), cert. denied, 470 U. S. 1035 (1985). Similarly, a panel of the Ninth Circuit declined in a brief *per curiam* opinion to recognize the privilege on the ground that the court was empowered under Rule 501 only "to . . . develo[p] . . . privileges extant in the common law." *In Re Grand Jury Proceedings*, 867 F. 2d 562, 565 (CA9) (*per curiam*), cert. denied, 493 U. S. 906 (1989).

The Tenth Circuit in *U.S.* v. *Burtrum*, 17 F. 3d 1299, 1301-1302 (CA10), cert. denied, 115 S. Ct. 176 (1994), rejected a psychotherapist-patient privilege in the context of a criminal prosecution for child sexual abuse. The court, however, made clear that it was not rejecting the psychotherapist-patient privilege altogether, but was "decid[ing] only the narrow question of whether to recognize a psychotherapist/client privilege in a criminal child sexual abuse context."

c. Next, most scholarly opinion lies on the side of recognizing the privilege. See, *e.g.*, 25 Wright & Graham § 5522, p. 136; 2 Weinstein & Berger ¶ 504[03], p. 504-17 n. 1 (collecting sources). This is the judgment even of many scholars who reject as unjustified the distinct privilege for confidential communications between a patient and his or her non-psychiatrist physician. Compare, *e.g.*, E. Cleary, *McCormick on Evidence* § 99, p. 213 n. 9 (2d ed. 1972) with *id.* § 105, p. 228.

d. Finally, even the Advisory Committee's Proposed Rules, roundly criticized for their narrow approach to privileges for confidential communications, included a version of the psychotherapist-patient privilege, one that would have protected communications between a patient and a psychiatrist or a licensed or certified psychologist. See 56 F.R.D. at 240 (Proposed Rule 504). Although the Proposed Rules were rejected by Congress, their inclusion of a psychotherapist-patient privilege further argues for its recognition.

It is clear that the intention of the Congress in rejecting the Proposed Rules was not to deny altogether the validity of any of the

particular privileges that would have been protected under them. To take the most plain example, "[o]bviously . . . [Congress's] failure to adopt promulgated Rule 503, dealing with the attorney-client privilege, did not mean that this privilege should not be recognized in the federal courts." *United States* v. *King*, 73 F.R.D. 103, 105 (E.D.N.Y. 1976) (Weinstein, J.).

The legislative history of Rule 501 confirms this reading. The Report of the Senate Judiciary Committee states:

> The committee has received a considerable volume of correspondence from psychiatric organizations and psychiatrists concerning the deletion of rule 504 of the rule[s] submitted by the Supreme Court. It should be clearly understood that, in approving this general rule as to privileges, [*i.e.*, Rule 501,] the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient . . ., or any other of the enumerated privileges contained in the Supreme Court rules.

S. Rep. No. 93-1277, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. and Admin. News 7051, 7059.

This Court has in the past relied on an examination of the Proposed Rules in assessing a claim for recognition of a privilege under Rule 501. See *United States* v. *Gillock*, 445 U. S. at 367-368 (relying in part on the absence in the Proposed Rules of a privilege for state legislators in declining to recognize any such privilege as a matter of federal law). As Judge Weinstein and Professor Berger have said: "[I]n many instances the proposed rules . . . remain a convenient and useful starting point for examining questions of privilege." 2 Weinstein & Berger ¶ 501[03], p. 501-32.

II. FAILURE TO RECOGNIZE THE PSYCHOTHERAPIST-PATIENT PRIVILEGE WOULD NEEDLESSLY RENDER THE PRIVILEGE FOR CONFIDENTIAL COMMUNICATIONS WITH CLERGY VULNERABLE TO ESTABLISHMENT CLAUSE CHALLENGE

The Establishment Clause requires neutrality toward religion. *Rosenberger* v. *Rector and Visitors of the University of Virginia*,

115 S. Ct. 2510, 2521 (1995). It thus prohibits government from "favoring religious adherents collectively over nonadherents." See *Board of Education of Kiryas Joel* v. *Grumet*, 114 S. Ct. 2481, 2487 (1994) (plurality opinion); *id.* at 2497 (O'Connor, J., concurring in part and concurring in judgment). Because of this principle, failure to recognize the psychotherapist-patient privilege would render vulnerable to constitutional challenge the analogous privilege for confidential communications between a religious individual and his or her clergyperson.

For many non-religious Americans, the psychotherapist plays a role similar to one played for many religious believers by members of the clergy. Patients seek consolation and guidance in the office of their psychotherapist. They address emotions related to the events of life and their relationships with others: grief, disappointment, loneliness, anxiety, regret, concern and sadness.

The opportunity "to disclose to a . . . counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive . . . consolation and guidance in return," *Trammel*, 445 U. S. at 51 (describing privileged communications between an individual and his or her clergyperson), cannot consistent with the Establishment Clause be provided to those of faith alone. To favor confidential communications with a clergyperson over those with a psychotherapist would be to abandon the neutrality toward religion that is required by the Constitution, and to advance religion. See, *e.g. Welsh* v. *United States*, 398 U. S. 333, 356-361 (1970) (Harlan, J., concurring in judgment) (Establishment Clause forbids the government to provide an exemption from military service for those whose conscientious objection to war emanates from a religious source, but not for those whose similar beliefs have a secular grounding). It would express an impermissible judgment that "priestly consolation and guidance," *Trammel*, 445 U. S. at 51, are more deserving of special protection than consolation and guidance of a secular type.

Although this case does not involve the question whether a psychotherapist-patient privilege is compelled by the Constitution, the Court should certainly take cognizance of the constitutional consequences that would likely follow from a failure to recognize

the privilege. Just as the Court has in the past construed laws to avoid the discriminations that would have rendered them invalid under the Establishment Clause, see, *e.g. Welsh*, 398 U. S. at 340 (1970) (plurality opinion) (construing the Universal Military Training and Service Act so as to sustain a conscientious objector claim rooted in "deeply and sincerely h[eld] beliefs that are purely ethical and moral in source"); *United States* v. *Seeger*, 380 U. S. 163, 173-185 (1965) (construing that provision to permit a conscientious objector claim not founded on a theistic belief), so, too, the Court here should construe the scope of privilege under Rule 501 in a way that does not render the privilege for confidential communications to one's clergyperson susceptible to Establishment Clause challenge.

III. COUNTERVAILING CONCERNS SHOULD BE ADDRESSED THROUGH EXCEPTIONS, AS THEY ARE IN THE CASE OF ATTORNEY-CLIENT PRIVILEGE

Petitioner raises at least one countervailing concern specific to this case, a concern about the possibility that Respondent Officer Mary Lu Redmond's testimony at trial was based on memory "enhanced" by her sessions with her psychotherapist, Karen Beyer. Pet. Br. 21-25. To begin with, this case therefore presents an appropriate opportunity for this Court to delineate the proper approach for addressing such countervailing concerns.

Under Rule 501 countervailing concerns that relate to specific applications of the psychotherapist-patient privilege should be addressed by categorical exceptions rather than by application of an *ad hoc* balancing test. This is the approach that this Court has taken with respect to other privileges recognized under the Rule. Thus, for example, in the context of the attorney-client privilege, an otherwise-privileged communication will not be protected if it falls within the crime-fraud exception to the privilege. But beyond an examination of the facts of each case to see whether the communication at issue falls within such a categorical exception, the court does not engage in an assessment in each case of the costs and benefits of adherence to the privilege. See, *e.g.*, *United States* v. *Zolin*, 491 U. S. 554, 562-563; cf. *Trammel*, 445 U. S. at 53

(holding categorically that there is no prohibition on spousal testimony where the witness-spouse wishes voluntarily to testify).[15]

An approach of addressing through categorical exceptions concerns about application of the privilege in particular contexts is also far preferable in operation to the use of an *ad hoc* balancing test. As the Court said in *Upjohn*, "if the purpose of the . . . privilege is to be served, the [individuals who are party to the privileged communication] must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." 449 U. S. at 393.

In this case, Petitioner alleges that testimony by Officer Redmond was the product of some sort of therapeutically "enhanced" memory. Pet. Br. 22-25; accord *id.* at 10. The circumstances of this case obviously do not raise the same concerns involved in those widely-publicized cases of "recovered memory" of childhood sexual abuse.[16] In a true case of recovered memory testimony it might well be appropriate, were the testimony held admissible, to create an exception to the psychotherapist-patient privilege. A privilege for confidential communications is not designed to shield underlying facts. Evidence concerning them can

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[15] In the psychotherapist-patient context there would be no need for a "crime-fraud" exception *per se*, because an individual cannot use communications with a psychotherapist, as he or she might use communications with a lawyer, "for the purpose of getting advice for the commission of a fraud or crime." *Zolin*, 491 U. S. at 563 (internal quotation marks and citation omitted). In a controversial decision, the California Supreme Court has held that when a psychotherapist determines that a patient "poses a serious danger of violence to others," that psychotherapist has a duty under state tort law to warn the police or the intended victims in circumstances where such warning is "necessary to avert danger to others." *Tarasoff* v. *Regents of the University of California*, 551 P. 2d 334, 344-348 (Cal. 1976) (In Bank). Whether such a circumstance could ever occur in the course of federal litigation to which a federal psychotherapist-patient privilege would otherwise apply, and whether, if so, the courts should in such a circumstance create an exception to the privilege, are of course questions not before this Court in the instant case.

[16] See, *e.g.*, *Franklin* v. *Duncan*, 884 F. Supp. 1435, 1438 (N.D.Cal. 1995).

ordinarily be adduced at trial, for example, by compelling the patient herself to testify about them. See, *e.g.*, *Upjohn*, 449 U. S. at 396. If the memories to which the patient will testify have themselves been "recovered" during some form of therapy, however, that therapy itself may become an appropriate issue for exploration in the case.

This Court, however, need not even address the issue in this case because there is no basis for Petitioner's claim of enhanced memory. Officer Redmond did testify to an improvement in her memory of how she held her gun on the day of the shooting at issue in this case. Joint Appendix 141-142; accord *id.* at 142-143, 139-140. In addition, Ms. Beyer testified that Officer Redmond told her at one point that she could not recall pulling the trigger of her gun, and that Officer Redmond was later able to recall this event. *Id.* at 113. There is, however, no evidence in this record that Officer Redmond's psychotherapy played any role in improving her memory. There is therefore an insufficient basis upon which to raise a claim that Officer Redmond's communications with Ms. Beyer come within any recovered-memory exception.[17]

Petitioner also may be read to suggest — again without any factual support — that the communications at issue in this case should not be protected by the privilege because of the risk that Officer Redmond's testimony was "rehearsed" in sessions with her psychotherapist, a "person employed by the Village of Hoffman Estates." Pet. Br. 22. This concern cannot justify an exception to the psychotherapist-patient privilege.

In *Upjohn* this Court faced a situation in which the risk of

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[17] Should the Court disagree about the strength of this evidence, the appropriate course would be to affirm the judgment of the Court of Appeals vacating the judgment of the District Court, and to instruct the District Court to consider in the first instance on remand the question of recovered memory. A party who could show "a factual basis adequate to support a good faith belief by a reasonable person" that testimony being given was "enhanced" or "recovered" through psychotherapy would probably be entitled, at the District Court's discretion, to an *in camera* review of the psychotherapist-patient communications at issue. *Zolin*, 491 U. S. at 572 (describing standard and procedure for evaluating an analogous claim that the crime-fraud exception applies).

improper coaching by a potentially-liable employer was far greater, yet the Court there was not deterred from recognizing the otherwise-proper claim of privilege. That case involved conversations about potentially illegal conduct between corporate employees and lawyers under the direction of in-house corporate counsel, who of course would have been fully aware of the legal implications of any information conveyed to them. See 449 U. S. at 386-389. Here, by contrast, Ms. Beyer, a licensed clinical social worker, is not trained in the requirements of the law. Moreover, in contrast to the lawyers in *Upjohn*, Ms. Beyer had a primary ethical obligation not to her employer but to Officer Redmond. See *NASW Code*, Principle II.F. Further, under Illinois law the information a clinical social worker like Ms. Beyer receives during a counselling session cannot be revealed to an employer like the Village of Hoffman Estates, regardless of who pays for the psychotherapy. See 740 Ill. Comp. Stat. Ann. § § 110/1 to 110/12.2 (1993 & Supp. 1995). The tools of cross-examination are plainly adequate in the circumstances of this case — as they must be in every case in which a witness has spoken with an attorney — to address any concerns about the type of abuse Petitioner implies.

IV. THE PRIVILEGE SHOULD BE DEFINED BY THE PSYCHOTHERAPIST'S FUNCTION, NOT BY HIS OR HER TITLE

This case involves application of the privilege to communications with a clinical social worker, Karen Beyer, licensed under Illinois law to "provi[de] mental health services," by procedures including "individual, marital, family and group psychotherapy," for the "evaluation, treatment, and prevention of mental and emotional disorders . . . based on knowledge and theory of psychosocial development, behavior, psychopathology, unconscious motivation, interpersonal relationships, and environmental stress." 225 Ill. Comp. Stat. Ann. § 20/3 (1995). Communications made to Ms. Beyer in the course of psychodiagnosis and psychotherapy clearly therefore should be covered by the privilege.

Petitioner urges this Court to adopt an arbitrary line, one that derives from rejected Rule 504, between psychiatrists and

psychologists on the one hand, and other licensed or certified psychotherapists on the other. See Pet. Br. 39-40. This Court should reject that proposal. Because the justifications for the psychotherapist-patient privilege turn on the function performed by the psychotherapist, its applicability should turn on that as well. See Louisell, 41 Minn. L. Rev. at 742. Consequently the privilege should be defined to apply to communications made to any psychotherapist licensed or certified by law to diagnose or treat mental or emotional disorders, regardless of his or her title.

Although one could argue that the case for the privilege applies to communications made even to unlicensed or uncertified practitioners of psychotherapy, licensing or certification provides an appropriate limit for this federal privilege. First, the adoption of licensure or certification procedures for members of a profession indicates recognition of that profession's value as a provider of an accepted form of treatment. Next, licensure or certification of an individual indicates recognition of that person's professionalism and of his or her competence as a member of his or her profession. Finally, licensure or certification of a psychotherapist may increase the expectation of a patient that his or her communications will be held in confidence. See Louisell, 41 Minn. L. Rev. at 742 n. 41.

Clinical social workers provide essentially the same psychotherapeutic services as psychiatrists and clinical psychologists. Indeed, a high percentage of mental health services in the United States are provided by clinical social workers. For example, in mental health organizations, in private psychiatric hospitals, and in freestanding outpatient psychiatric clinics, the number of social workers is greater than the number of psychiatrists and psychologists combined.[18] A categorical distinction based solely on job title rather than professional function would thus unjustifiably and drastically limit the class of psychotherapeutic patients protected by the privilege. For this reason, many commentators have urged its rejection. See, *e.g.* 25 Wright & Graham § 5525, p. 188.

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[18] See U.S. Dept. of Health and Human Services, Center For Mental Health Services, *Mental Health, United States, 1994* 107-113 (Manderscheid and Sonnenschein, ed. 1994) (*Mental Health*) (1990 data).

It is true that the limitation urged by Petitioner was proposed by the Advisory Committee in Proposed Rule 504. However no satisfactory explanation has ever been given for the Advisory Committee's decision to draw this line in the Proposed Rules. See *Id.* § 5526, p. 190-191. In any event, in the year after the Proposed Rules were promulgated only two States provided a privilege for communications between a patient and a certified or licensed social worker. See Comment, *Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers*, 61 Calif. L. Rev. 1050, 1052 n. 11 (1973). Today, twenty-two years later, forty-four States and the District of Columbia provide some form of privilege to communications between a patient and a licensed or certified clinical social worker.[19] This is a clear indication that whatever purpose the distinction might have served has long since evaporated.

Arbitrarily limiting the privilege to psychiatrists and psychologists could also have grave economic consequences. As a rule, clinical social workers provide diagnosis and treatment of mental and emotional disorders at less cost than those professionals do. Indeed, at a time when health care costs have escalated, clinical social workers have been relied upon to provide an increasingly great share of mental health services in some settings.[20] Refusal to recognize a privilege for licensed clinical social workers, however, would likely decrease the extent to which many in need of psychotherapy would find treatment by a licensed clinical social worker acceptable, both because clinical social workers would be unable to offer confidentiality and because this inability would brand them as second-class providers of health care. As demand for the limited pool of psychologists and psychiatrists grew, the

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[19] Of the nine States described by Petitioner as without a privilege for confidential communications with a licensed or certified clinical social worker, see Pet. Br. 35 n. 66, three in fact do have such a privilege. See Ariz. Rev. Stat. Ann. § 32-3283 (1992); Utah R. Evid. Ann. 506 (1995); Tex. R. Civ. Evid. 510 (West 1995); Tex. Hum. Res. Code Ann. § 50.001(b)(6) (West Supp. 1996).

[20] See, *e.g.*, *Mental Health* 114 (data over time for freestanding partial care and multiservice mental health organizations).

price of those professionals' psychotherapeutic services would rise even further. The net result would be a reduction in the availability of needed mental health care services and a substantial increase in their cost. See *House Hearings* at 480-481 (statement by Col. Sherman Ragland).

Just as refusal to recognize the privilege altogether would undermine state efforts to encourage the treatment of mental illness, see *supra* at 20, so an artificial refusal to include communications with licensed or certified clinical social workers within the privilege could wreak havoc on state attempts to control health care costs. A failure by this Court to recognize the psychotherapeutic function performed by clinical social workers under the authorization of state law could cause a substantial disruption in this area of traditional state regulation. Both practical considerations and a proper regard for this Court's role in the federal system therefore counsel against the exclusion of communications with licensed or certified clinical social workers from the protection of the psychotherapist-patient privilege.

CONCLUSION

The Court should recognize the psychotherapist-patient privilege and affirm the judgment of the Court of Appeals.

Respectfully submitted,

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January 2, 1996